No. 96-292

Supreme Court, U.S.
FILED
DEC 5 1996
CLERK

In The

Supreme Court of the United States

October Term, 1996

MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, and H. DEAN SUMMERS, each of them individually, and the IDAHO STATE LIQUOR DISPENSARY,

Petitioners,

vs.

KRISTINE L. FANKELL,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Idaho

BRIEF OF THE COMMONWEALTH OF KENTUCKY AND THE STATES OF ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, FLORIDA, GEORGIA, HAWAII, ILLINOIS, IOWA, KANSAS, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TEXAS, VERMONT, VIRGIN ISLANDS, WASHINGTON, WEST VIRGINIA, AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE

Hundreds, if not thousands, of § 1983 actions are filed in state and federal courts each year. Some are meritorious while many are frivolous. A state official sued in state court cannot always remove the action to federal court because removal requires unanimity of all defendants. 28 U.S.C. § 1441(a). Consequently, much of § 1983 litigation occurs in a state forum.

Absolute and qualified immunities are critically important to the effective operation of state government. These operate to shield the good faith decisions and reasonable acts of public officers from liability. This helps to insure that the proper exercise of discretion by public officials is not chilled, and that officials are not deflected from attending to the public's business.

In federal courts, there is a well established right to an interlocutory appeal of a pretrial denial of the qualified immunity defense. This Court has repeatedly held that an interlocutory appeal insures the full benefit of this immunity: immunity from discovery and trial. Nonetheless, state courts are presently divided on whether a pretrial denial of qualified immunity is immediately appealable. The majority of state courts properly reason that to prohibit an interlocutory appeal effectively extinguishes the federal immunity. These courts hold that such a result is preempted by federal jurisprudence. Other state courts have held the opposite, concluding that a state procedural rule preventing an interlocutory appeal can be applied.

Amici curiae hold a common view that the substantive protection afforded to state officials by qualified

immunity, i.e., immunity from discovery and suit, should not depend on the procedural rules of the state where suit is brought. The rule instead must be a uniform application of the federal right of interlocutory appeal irrespective of forum.

SUMMARY OF ARGUMENT

This Court held in *Felder v. Casey*, 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988), that § 1983 actions brought in state courts must protect the federal substantive rights of the parties. Qualified immunity is such a substantive right. Under this Court's precedent, qualified immunity cannot be extinguished by a state procedural rule. Nevertheless, while some state appellate courts rightly acknowledge this principle, others, such as the Idaho Supreme Court, refuse. This refusal effectively eliminates the immunity in those cases where the trial court's initial determination is ultimately deemed erroneous.

Qualified immunity is too important to the effective functioning of government to be threatened in this manner. This Court held in *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), that when Congress enacted 42 U.S.C. § 1983 it did not intend to abrogate the immunity defenses. This Court recognized that these defenses are imperative to the sound exercise of discretion by public officials and the effective operation of government.

The issue presented by this litigation is neither complex nor novel. Amici simply request that the rule of

interlocutory appeal applicable to § 1983 claims brought in federal courts be extended to those litigated in state courts.

ARGUMENT

I. The Established Jurisprudence of this Court Recognizes a Right To an Interlocutory Appeal.

This Court has recognized many times that Congress did not intend to "abolish wholesale all common-law immunities" when the Civil Rights Act of 1871 was enacted. *See, e.g., Scheuer v. Rhodes*, 416 U.S. at 243, 94 S.Ct. at 1690, 40 L.Ed.2d at 101. Because of common law precedent predating the enactment of the Civil Rights Act, or their constitutional status, some officials have "absolute immunity" from suit.

It is well settled that legislators have absolute immunity in their legislative functions, judges in their judicial functions, and prosecutors in their adversarial functions. *See, e.g., Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975) (legislative immunity); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872) and *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978) (judicial immunity); and *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) (prosecutorial immunity). Absolute immunity provides protection from suit even for clearly erroneous or malicious behavior. The policy behind this heightened immunity protection is to afford greater protection for officials whose unique functions (legislative, judicial, or prosecutorial) make them more vulnerable to suit, and allow

them to exercise the independence of judgment essential to the proper functioning of these important offices.

Absolute immunity is granted sparingly in a few narrow functional categories. It protects judicial, legislative, and prosecutorial functions regardless of the title of the defendant official who performs these acts. Even so, judges, prosecutors, and legislators do not have absolute immunity for other functions such as administrative or investigative acts.

Because absolute immunity has been sparingly recognized, most officials have a lesser "qualified" immunity from suit. This immunity has evolved from common law origins which often turned on the subjective "bad faith" of the officials.

In *Scheuer v. Rhodes, supra,* and *Wood v. Strickland,* 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975), this Court established a qualified immunity test based on common law immunity doctrine that had objective and subjective components. Under the objective part of the test, the official had immunity if he could show the constitutional violation he allegedly committed was not clearly established by prior law. The subjective prong provided for immunity where the official acted in good faith, which almost inevitably was a question for the factfinder at trial.

This subjective test did not protect officials from the burdens of discovery or trial. In *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396, 410 (1982), this Court recognized that public policy considerations compelled it to modify this test to provide more protection for public officials.

Harlow recognized that the Civil Rights Act was enacted as an avenue for vindication of important constitutional guarantees. This is the reason most public officers do not have absolute immunity. "At the same time," this Court said, "it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty – at a cost not only to the governmental officials, but to society as a whole." *Id.,* 457 U.S. at 814, 102 S.Ct. at 2736, 73 L.Ed.2d at 408. "These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is a danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials] in the discharge of their duties.' " *Id.,* 457 U.S. at 814, 102 S.Ct. at 2736, 73 L.Ed.2d at 408 (quoting *Gregoire v. Biddle,* 177 F.2d 579, 581 (2nd Cir. 1949), *cert. denied,* 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed.2d 1363 (1950)). *See also, Hunter v. Bryant,* 502 U.S. at 229, 112 S.Ct. at 537, 116 L.Ed.2d at 596.

So, the test needed adjustment to protect against these unacceptable costs. This was done in *Harlow.* Here, this Court removed the subjective component of the test, so that "bare allegations of malice should not suffice to subject government officials to either the costs of trial or the burdens of broad-reaching discovery." *Id.,* 457 U.S. at 818, 102 S.Ct. at 2738, 73 L.Ed.2d at 410. This Court held that the federal common-law qualified immunity provides a shield from civil liability "insofar as [an official's] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would

have known." *Id.*, 457 U.S. at 818, 102 S.Ct. at 273, 73 L.Ed.2d at 410.

This rule, and its underlying principles, represents the current state of the law. As this Court recently said, "*Harlow* adopted this criterion of 'objective legal reasonableness,' rather than good faith, precisely in order to 'permit the defeat of insubstantial claims without resort to trial.' " *Behrens v. Pelletier*, 516 U.S. at ___, 116 S.Ct. at 838, 133 L.Ed.2d at 783 (quoting *Harlow*, 457 U.S. at 819, 102 S.Ct. at 2722, 73 L.Ed 2d at 396). This provides protection to all but the plainly incompetent and those that would knowingly violate the law. *Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991). Thus, this Court has provided public officials with tools that work: summary judgment and Rule 12 motions that can weed out meritless claims.

Unsurprisingly, qualified immunity was subsequently held by this Court to be "an *entitlement* not to stand trial or face the burdens of litigation, conditioned on the resolution of the essentially legal [immunity] question." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411, 425 (1985) (emphasis added). As later clarified by this Court, "One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277, 287 (1991). This is the full scope and benefit of an immunity to which an official is entitled.

As a result, this Court established in *Mitchell* that "a district court's denial of a claim of qualified immunity, to

the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Id.*, 472 U.S. at 530, 105 S.Ct. at 2817, 86 L.Ed.2d at 427. This Court properly recognized that this was the only practical way in which the full benefit of the immunity could be realized by an official.

In granting this right of interlocutory appeal, this Court applied the "collateral order" doctrine of *Cohen v. Beneficial Industrial Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) to a trial court order denying a qualified immunity defense and authorized an interlocutory appeal. This Court did so in recognition of the reality that qualified immunity is also an immunity from suit, not just from liability, so that the normal rule against interlocutory appeals does not apply. More recently, this Court has restated the *Cohen* doctrine to clarify that interlocutory appeals are justified if the trial court order:

> [1] conclusively determine[s] the disputed question, [2] resolve[s] an important issue completely separate from the merits of the action, and [3] [is] effectively unreviewable on appeal from a final judgment.

Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 144, 113 S.Ct. 684, 688, 121 L.Ed.2d 605, 613 (1993).

Last term, this Court held that the right of interlocutory appeal was so important it was not limited by the "one interlocutory-appeal" rule. *Behrens v. Pelletier, supra,* held that a trial court's successive denial of qualified immunity may require more than one interlocutory appeal. For example, an official may assert qualified

immunity in a motion to dismiss. The official may file an immediate appeal if that motion is denied. If that decision is affirmed and the parties engage in discovery, the official may argue again for immunity in a motion for summary judgment. If that motion is denied, the official may file another immediate appeal. This result is just because the importance of the qualified immunity's "trial avoiding" purpose outweighs possible delays associated with multiple appeals. *Id.*, 516 U.S. at ___, 116 S.Ct. at 842, 133 L.Ed.2d at 789 (J. Breyer dissenting).

Under the supremacy clause, states have concurrent jurisdiction and a concurrent duty to enforce federal law. *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). From this proposition, three corollaries follow:

> 1. A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a 'valid excuse.'
>
> 2. An excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to disassociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.
>
> 3. When a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, [this Court] must act with the utmost caution before deciding that [the State Court] is obligated to entertain the claim.

Howlett v. Rose, 496 U.S. 356, 369-372, 110 S.Ct. 2430, 2439-2440, 110 L.Ed.2d 332, 348-350 (1990). This Court has

rarely upheld a state court's refusal to entertain a federal cause of action. *Id.*, 496 U.S. at 374, 110 S.Ct. at 2442, 110 L.Ed.2d at 352.

When state courts exercise their concurrent jurisdiction to enforce a plaintiff's federal rights (thereby accepting the duty to protect a defendant's federal defenses), "[s]tates may establish the rules of procedure governing litigation in their own courts. By the same token, however, where state courts entertain a federally created cause of action, the 'federal right cannot be defeated by the forms of local practice.' *Brown v. Western R. Co. of Alabama*, 338 U.S. 294, 296, 70 S.Ct. 105, 106, 94 L.Ed. 100 (1949)." *Felder v. Casey*, 487 U.S. at 138, 108 S.Ct. at 2306, 101 L.Ed.2d at 137.

This Court further explained that "Under the Supremacy Clause of the Federal Constitution, '[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law.' For 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.' *Free v. Bland*, 369 U.S. 663, 666, 82 S.Ct. 1089, 1092, 8 L.Ed.2d 180 (1962)." *Felder v. Casey*, 487 U.S. at 138, 108 S.Ct. at 2307, 101 L.Ed.2d at 138.

Felder struck down Wisconsin's "notice-of-claim" statute, which had been used to bar a plaintiff's § 1983 suit, because the statute conflicted with "both its purpose and effects with the remedial objectives of § 1983, and because its enforcement in such actions will frequently and *predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court. . . .* " *Id.*, 487 U.S. at 138, 108 S.Ct. at 2307,

101 L.Ed.2d at 140 (emphasis added). This Court has clearly held that "[s]tates may not apply such an outcome-determinative law when entertaining substantive federal rights in their courts." *Id.*, 487 U.S. at 138, 108 S.Ct. at 2308, 101 L.Ed.2d at 138.

This Court applied its reasoning in *Felder* to void a state law that defeated the filing of a § 1983 suit by a plaintiff. This Court's reasoning is equally applicable to a state law governing the filing of interlocutory appeals in § 1983 suits by a defendant state official. A state's procedural rule which conflicts with the superior federal substantive rule must yield, or else the state official's right not to stand trial is simply illusory.

II. Current Status of Interlocutory Appeal in the States.

The majority of states which have addressed the issue of a state official's right to file an interlocutory appeal of a pretrial denial of qualified immunity have concluded that the state appellate courts must either accept interlocutory appeals or provide some other avenue of contesting the pretrial denial.[1] These states recognize the clear primacy of federal law in this area and the principle that the federal rights of the parties in § 1983 litigation cannot be extinguished by state law. *Abell v. Dewey*, 870 P.2d 363 (Wyo. 1994); *Breault v. Chairman of Bd. of Fire Com'rs*, 513 N.E.2d 1277 (Mass. 1987); *Carrillo v. Rostro*, 845 P.2d 130 (N.M. 1992); *City of Lakewood v. Brace*,

[1] Some states have denied the right of interlocutory appeal, but permitted the filing of original actions, i.e., petitions for writ of mandamus or petitions for writ of error.

919 P.2d 231 (Colo. 1996); *Corum v. University of North Carolina*, 389 S.E.2d 596 (N.C.App. 1990); *Henke v. Superior Court*, 775 P.2d 1160 (Ariz.App. 1989); *Lord v. Murphy*, 561 A.2d 1013 (Me. 1989); *McGovern v. City of Minneapolis*, 475 N.W.2d 71 (Minn. 1991); *McLin v. Trimble*, 795 P.2d 1035 (Okla. 1990); *Murray v. White*, 587 A.2d 975 (Vt. 1991); *Richardson v. Chevrefils*, 552 A.2d 89 (N.H. 1988); *Ryan v. City of Augusta*, 622 A.2d 74 (Me. 1993); *State v. Hogg*, 535 A.2d 923 (Md. 1988); *Samuel v. Stevedoring Services of America*, 29 Cal.Rptr.2d 420 (Cal.App. 2 Dist. 1994); *Tucker v. Resha*, 648 So.2d 1187 (Fla. 1994); *Virden v. Roper*, 788 S.W.2d 470 (Ark. 1990).

A few states have allowed appellate review on a *discretionary* case-by-case basis without directly resolving the issue of the right of interlocutory appeal. *Ex Parte Franklin County Dept. of Human Resources*, 674 So.2d 1277 (Ala. 1996); *Lancie v. Giles*, 572 A.2d 827 (Pa.Cmwlth. 1990); *Walden v. City of Seattle*, 892 P.2d 745 (Wash.App. Div. 1 1995).

A small minority of states, which Idaho has recently joined, do not permit interlocutory appeals. These states hold that a § 1983 defendant takes the state court's procedural rules "as is" – even if those rules defeat the substantive federal right of qualified immunity. *Civil Service Emp. Ass'n v. Moritz*, 529 N.E.2d 1290 (Ohio App. 1987); *Klindtworth v. Burkett*, 477 N.W.2d 176 (N.D. 1991); *Noyla v. Flores*, 740 S.W.2d 493 (Tex.App. – Corpus Christi 1987); *Pizzato's, Inc. v. City of Berwyn*, 523 N.E.2d 51 (Ill.App. 1 Dist. 1988); *Turner v. Giles*, 450 S.E.2d 421 (Ga. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1959, 131 L.Ed.2d 851 (1995).

The remaining states, including the lead amicus Kentucky, have yet to address the issue. The proper resolution is to acknowledge that the majority view is correct under this Court's jurisprudence.

III. The Right of Interlocutory Appeal Preserves a Substantive Federal Right and Prevails Over State Procedural Rules

Resolution of whether a trial court's pretrial denial of qualified immunity is subject to appeal requires the determination of whether the right of interlocutory appeal is merely a federal procedural rule or an important federal substantive right intended to preserve the immunity from suit. This Court answered this question in *Mitchell* where it described the right as an "entitlement." This Court equated the right of interlocutory appeal in this context to a defendant's claim of right not to stand trial on double jeopardy grounds. This is because a defendant will be irreparably harmed even if found not guilty at a second criminal trial. *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). *Abney* speaks of a federal right to "not stand trial" if a trial should *legally* not occur. Consequently, this Court's jurisprudence provides that an interlocutory appeal is the *only* way to give full protection to this constitutional right "not to face trial at all." *Id.*, 431 U.S. at 662, n.7, 97 S.Ct. at 2041, 52 L.Ed.2d at 662.

This Court has also emphasized the importance of resolving the qualified immunity issue at the earliest possible stage of litigation so as to shield state officials from the disruptive effects of modern litigation. *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523

(1987). The *Mitchell* rule, which initially established the right of interlocutory appeal, was arguably an interpretation of the federal court's final judgment rule and collateral order doctrine. Subsequent case law has clarified that the right of interlocutory appeal is an integral aspect of qualified immunity and states must accept this the same as they must accept the federal definition of qualified immunity.

The importance of the federal qualified immunity defense to state officials sued pursuant to 42 U.S.C. § 1983 is heightened by the unavailability of state immunity defenses. *Martinez v. State of Cal.*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980); *Monessen Southwestern R. Co. v. Morgan*, 486 U.S. 330, 108 S.Ct. 1837, 100 L.Ed.2d 349 (1988). Therefore, only the immunities derived from federal common law can be employed. *Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990). The scope of the common law federal right of qualified immunity in a state court proceeding is the same as that found in federal court. In short, the application of immunity is governed by federal law. *Martinez v. State of Cal.*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980). It is well settled that state immunity law is preempted in a § 1983 action irrespective of forum. *Felder v. Casey*, 487 U.S. at 138, 108 S.Ct. at 2306, 101 L.Ed.2d at 137.

The federally recognized entitlement to qualified immunity, i.e., the right "not to stand trial," is forever lost if an erroneous pretrial adjudication of that entitlement goes to trial. "States may not apply such an outcome-determinative law when entertaining substantive rights in their courts." *Felder v. Casey*, 487 U.S. at 140, 108 S.Ct. at 2308, 101 L.Ed.2d at 139.

The outcome in a federal § 1983 suit – whether a state official is erroneously required to stand trial and thereby denied a substantive federal right – should not be determined by the forum where suit is brought. State courts have a constitutional duty to recognize and enforce a state official's substantive right of interlocutory review of a decision denying a claim of qualified immunity.

IV. Public Policy Demands That an Interlocutory Appeal Lie in Actions Brought in State Court the Same as in Federal Court.

The most obvious public policy basis supporting the right to an interlocutory appeal is that it is fundamentally unfair and a violation of equal protection to have an arbitarily drawn dual standard. This is particularly true where, as here, there is absolutely no rational basis for making a distinction. This Court used the same liability and immunity tests previously applied to actions against state and local officials brought under § 1983 to constitutional actions brought against federal employees. In doing so, this Court said it would be "untenable" to have different standards of liability or immunity merely because the defendants worked for different governments. *Bivens v. Six Unknown Named Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Likewise, the existence of differing appealability standards between federal and some state courts undermines the policy reasons for qualified immunity. This is untenable.

This Court has observed that it has "never held that state courts *must* entertain § 1983 suits." *National Private Truck Council v. Oklahoma Tax Commission*, 515 U.S. ___,

n.4, 115 S.Ct. 2351, 2355, n.4, 132 L.Ed.2d 509, 516, n.4 (1995). However, "whether the state courts are obliged to hear § 1983 claims is largely of academic interest, 'because virtually all states have explicitly asserted jurisdiction over § 1983 claims, and no state categorically bars § 1983 actions from its courts.' " Schwartz & Kirklin, *Section 1983 Litigation, Claims Defenses & Fees*, Vol 1, p. 46 (1991), quoting S. Steinglass, *Section 1983 Litigation in State Courts* § 9.1, at 9-1 (1988). Although most § 1983 actions are filed in the federal courts, they are increasingly being filed in state courts. Thus, the need for uniformity. *See*, S. Steinglass, *Section 1983 Litigation in State Courts* at 1-1, & 2.1, at 2-1.

Because of the current lack of uniformity, the principles underlying qualified immunity are not well served. This is particularly true where state trial judges do not have the same level of experience with § 1983 claims as their federal counterparts. Thus, the need for an interlocutory appeal is even *greater* in a state court, because of the increased likelihood of judicial error in denying a claim of immunity predicated upon *federal* common law.

A defendant cannot always choose the forum in which the action will be litigated. It is not unreasonable to assume many plaintiffs prefer filing § 1983 claims in state court knowing that defendants enjoy *greater* immunity in federal court with the existence of an interlocutory appeal right. A public official ought not be forced to surrender even an iota of his immunity simply because removal is not possible.

The important public policy interests underlying this interlocutory appeal doctrine established by *Harlow* and

Mitchell are well known. These policies are all undermined when state courts refuse to allow immediate appeals when immunity is denied.

Some of the societal costs are plain. Public officials are distracted from their duties when they face the usual burdens of litigation. Federal, state, and local governments expend millions of dollars defending all too frequent frivolous suits by prisoners and others. *See*, Schuck, *Suing our servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 S.Ct. Rev. 281, 283, n.2. These costs are minimized where interlocutory appeals are available.

The need for officials to engage in fearless decision making is an even more compelling policy basis, but not always as obvious. Government officials are more likely to govern fairly, reasonably, and properly if they are free from the threat of baseless and harassing litigation. This is true for all branches of government. Judges need to be free of the fear that dissatisfied litigants will seek revenge for their decisions claiming bias or corruption. Legislators should be free to vote their convictions without threat of suit by political opponents or those who dislike being subject to the particular statute or regulation. Members of the executive branch who develop or implement policy should be free to serve the public interest.

Lower level executive officials, especially, face daily choices between taking actions that expose them to a high risk of being sued if the public interest is pursued, or looking the other way so as to avoid or minimize a personal risk. *See generally*, Schuck, at 295-316. Society as

a whole suffers when public officials sacrifice the public interest to minimize their personal risk.

These are policy concerns which this Court has recognized justify the existence of official immunity. These policy concerns justify interlocutory appeal in federal court. These policy concerns also justify this Court to *now* hold that a state procedural rule must not threaten the essential qualified immunity protection of public employees by recognizing the right of interlocutory appeal in all § 1983 actions – irrespective of forum.

CONCLUSION

When Congress enacted 42 U.S.C. § 1983, it did not intend to abrogate the immunity defenses. Qualified immunity is a critical defense not only to individual § 1983 defendants sued in state court, but also to state and local government generally. The immunity, by protecting the reasonable decisions and acts of public officials, protects the effective operation of government. This is a valid public purpose worthy of this Court's protection. State government simply cannot afford to have this defense extinguished. The immunity should not be defeated because of the forum in which the claim is litigated. Yet, this is the result which state procedural rules that prohibit an immediate appeal accomplish. This Court

is respectfully requested to hold that the principles articulated in *Felder v. Casey, supra,* apply to § 1983 defendants, not merely to § 1983 plaintiffs.

Respectfully submitted,

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December 5, 1996